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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

EVRA CORPORATION, formerly known as Hyman-Michaels Company,

Petitioner,

v.

SWISS BANK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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September 21, 1982

QUESTIONS PRESENTED

1. Whether banks which negligently lose telex directions should be insulated from recovery of damages by injured customers.

2. Whether the Court of Appeals violates Rule 52(a) of the Federal Rules of Civil Procedure by ignoring the trial court's findings of fact and substituting its own de novo findings.

3. Whether the Court of Appeals in a diversity action can disregard the law of the state whose law governs the case.

4. Whether the Court of Appeals' reading of Hadley v. Baxendale is applicable to contemporary international banking transactions.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	3
I. MATERIAL FACTS	3
II. PROCEEDINGS BELOW	12
REASONS FOR GRANTING THE WRIT	14
I. THE COURT OF APPEALS ERRS IN INSULATING BANKS FROM DAMAGES FOR LOSING DIRECTIONS SENT BY TELEX.....	14
II. THE COURT OF APPEALS VIOLATES RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE BY DISREGARDING THE TRIAL COURT'S FINDINGS OF FACT.....	18
A. The Court of Appeals Substitutes Its De Novo Findings Concerning the Forseeability of Damages.....	20
B. The Court of Appeals Substitutes Its Findings Concerning Contributory Negligence.....	24

PAGE

III. THE COURT OF APPEALS IMPROPERLY IGNORES CONTROLLING ILLINOIS LAW WHICH ALLOWS A PRINCIPAL TO RECOVER A TORT MEASURE OF DAMAGES FOR A BREACH OF DUTY BY AN AGENT..... 32

IV. THE COURT OF APPEALS' READING OF HADLEY V. BAXENDALE IS INAPPLICABLE TO CONTEMPORARY INTERNATIONAL BANKING TRANSACTIONS..... 38

CONCLUSION 42

TABLE OF AUTHORITIES

PAGE

Cases

Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) 24

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 36

Gurney Industries, Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972) ... 40

Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) 32-42

Miller v. John, 111 Ill. App. 56 (2d Dist. 1903) 34

McAllister v. United States, 348 U.S. 20 (1954) 25

O'Brien v. Chicago & N.W. Ry. Co., 329 Ill. App. 382, 68 N.E.2d 638 (1946) 36

Siegel v. Western Union Tel. Co., 312 Ill. App. 86 (1941) 33

The Heron II, Koufos v. C. Czarnikow, Ltd., [1967] 3 All ER 686, [1969] 1 AC 350 at 385.. 40

United States v. Hill Lines, Inc., 175 F.2d 770 (5th Cir. 1949) ... 25

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 19

PAGE

Statutes

28 U.S.C. § 1254 (1) 3

Rule 52(a), Fed. Rules of Civil Procedure 19

Other Authorities

2 Harper & James, The Law of Torts, § 20.5 (1956) 36

G. Gilmore, The Death of Contract, 83-84, 88 (1974) 40

Patterson, The Apportionment of Risks Through Legal Devices, 24 Colum. L. Rev. 335, 342 (1924) 32

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No. _____

EVRA CORPORATION, formerly known as Hyman-Michaels Company,

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SWISS BANK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Evra Corporation,[1] formerly known as Hyman-Michaels Company ("Hyman-Michaels"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

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1/ Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Petitioner Evra Corporation: None.

Seventh Circuit entered in this proceeding on March 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, reversing the decision of the District Court and reported at 673 F.2d 951 (7th Cir. 1982), appears as Appendix A to this petition. The decision of the District Court for the Northern District of Illinois is reported at 522 F. Supp. 820 (1981), and appears as Appendix B to the petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 19, 1982. A timely petition for rehearing in banc was denied on June 23, 1982, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. MATERIAL FACTS

This dispute arose following the mishandling of an intercontinental telex message by Swiss Bank Corporation ("Swiss Bank"), a major international bank with offices throughout the world, resulting in petitioner Hymar Michaels' loss of a ship charter worth two million one hundred thirty seven thousand seven hundred thirty one and 65/100 dollars ($2,137,731.65). Swiss Bank either lost the telex message or failed to have paper in its receiving telex machine at the time that the message was received. The mishandled telex directed Swiss Bank to make payment to the ship owner's account at Banque de Paris et des Pays-Bas ("Banque de Paris") in Geneva, Switzerland, in payment of an install-

ment of charter hire for the ship, M.V. Pandora. Since the payment was not made as directed by the telex, the owner was permitted by an arbitration panel to withdraw the ship from charter.

Petitioner Hyman-Michaels,[2/] an Illinois corporation engaged in the international and domestic purchase and sale of scrap metals, entered into a ship charter with the Pandora Shipping Company in June, 1972. Payments were to be made semi-monthly in advance to the owner's account at Banque de Paris in Geneva, Switzerland. Hyman-Michaels made the payments of the first, fifth and eighth through eighteenth installments of the charter hire by wire transfers through Continental Illinois National Bank and Trust Company of Chicago

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[2/] Hyman-Michaels sold its scrap metal business and changed its name to Evra Corporation in 1976.

("Continental") and Swiss Bank.

Swiss Bank had a correspondent banking relationship with Continental, i.e., it maintained an account at Continental in Chicago, Illinois, and allowed its account to be credited for the purpose of transmitting such credits to its customers, such as Banque de Paris, which did not maintain direct accounts with Continental. Payment was accomplished by Continental first debiting Hyman-Michaels' account and crediting Swiss Bank's account, then notifying Swiss Bank by means of a telex that Swiss Bank's account in Chicago had been credited and instructing Swiss Bank to credit Banque de Paris' account. Continental used its London branch as a relay station for all telex transfers to Europe.

In October, 1972, the owner of the Pandora attempted to withdraw its ship from the charter because the seventh installment, which had been mailed and was due on October 26, had not been

received by Banque de Paris. The matter was submitted to an arbitration panel, which ruled that the owner could not withdraw the ship but which placed Hyman-Michaels on notice that the payment provision of the charter would be strictly enforced thereafter. Beginning with the eighth installment payment, the procedure followed by Hyman-Michaels was to have its accounting department make a request to Continental to effect a wire transfer a few days before each charter hire payment was due.

At or about 9:17 A.M. on Wednesday, April 25, 1973, Hyman-Michaels, in accordance with the payment procedure it had used since October, 1972, telephoned Continental and requested that it make a wire transfer of $27,000.00 to the account of the Pandora's owner at Banque de Paris for the charter hire period of April 27 through May 11, 1973. Payment of this installment was due at or before 9:00 P.M. Geneva time on Friday, April

27, 1973. Continental immediately debited Hyman-Michaels' account and credited Swiss Bank's account. The requested telex was sent on the afternoon of April 25 to Continental's London office for retransmittal to Swiss Bank in Geneva.

Early the next morning, a telex operator in Continental's London office dialed, as instructed, Swiss Bank's general telex number, which rings in the bank's cable department. After trying unsuccessfully for almost an hour to reach the general number, the Continental telex operator dialed the number of a machine in Swiss Bank's foreign exchange department, which he had used several times in the past when the general number was engaged without objection by Swiss Bank. It is undisputed that this machine received the telexed message because Continental's copy of the telex contained a confirmed answer back code at the beginning and at

the end of the message. The answer back code is printed on the sender's telex by means of electrical impulses generated by the receiving machine. It confirms that there is a through connection between the two machines. Despite receiving the telex, Swiss Bank failed to comply with the payment order, and no transfer of funds was made to the account of the Pandora's owner in the Banque de Paris.

Swiss Bank either (a) lost the April 25, 1973 telex message, or (b) failed to have paper in its machine at the time that the message was being received, in which case no actual copy of the message would have been produced. Despite receiving an average of three to four telexes per week destined for other departments of the bank, Swiss Bank's foreign exchange room had no procedure for logging these telexes or insuring that they were promptly acted upon. Additionally, in April, 1973, Swiss

Bank's telex machines in its foreign exchange room were not equipped to make copies of telex messages received. Nor did these machines automatically shut off when they ran out of paper, but continued to receive messages which were not recorded in any manner. Moreover, Swiss Bank had no systematic method of checking the telex machines in the foreign exchange room to see if they had paper. The machines were operated by junior foreign exchange dealers who were not professional telex operators.

At about 8:30 A.M. (Chicago time) on Friday, April 27, 1973, Hyman-Michaels received a telex message from the owner of the Pandora stating that the charter was cancelled because the nineteenth installment had not been paid to its account at Banque de Paris. By 9:00 A.M., Hyman-Michaels contacted Continental and instructed Continental to instruct its correspondent, Swiss Bank, to persist in attempting to effect the

payment even in the face of a rejection by the owner's bank. Hyman-Michaels also telephoned the owner's representative in Geneva on the same morning and told him that payment had been made. The owner persisted in his decision to withdraw and notified Hyman-Michaels that all further attempts to effect payment would be rejected. Hyman-Michaels' admiralty counsel in New York were also informed of the situation that morning. They contacted the owner's attorneys and reached an agreement that day for the submission of the dispute to arbitration.

Also on April 27, 1973, Continental attempted to determine what had gone awry with the telex it had sent. After determining that the telex had been sent but that Swiss Bank had no record of it, Continental asked Swiss Bank if the transfer could be carried out by giving the tested telex code and payment instructions over the telephone. Continental was informed by Swiss Bank, however,

that it was too late (it being approximately 6:00 P.M. in Geneva at that time). No action was taken on the following two days, Saturday, April 28 or Sunday, April 29, 1973. On Monday, April 30, 1973, Continental instructed its Geneva representative to try to find out what had happened to the April 25 wire transfer.

After additional efforts by Swiss Bank to locate the missing telex message, Swiss Bank suggested to Continental, on May 1, 1973, that it retransmit the telex to the general telex number, which Continental did that afternoon. Swiss Bank retransmitted the May 1, 1973 telex to Banque de Paris on May 2, 1973.

On May 21, 1973, following arbitration hearings, the arbitrators held that the owner was entitled to withdraw the Pandora from the charter. In their decision, however, the arbitrators stated that "the root cause of this situation did not lie with [Hyman-Michaels],

as very definite proof was shown to the Panel that payment was properly made by [Hyman-Michaels] in sufficient time on April 25th A.M., through their Bank, Continental. . . ." The arbitrators also stated that Hyman-Michaels was not alerted to the fact that Swiss Bank had lost the instructions and failed to make payment in time until Hyman-Michaels received a message from the owner on April 27th at 8:30 A.M. Chicago time. On July 5, 1973 the arbitrators' decision was confirmed by the United States District Court for the Southern District of New York.

II. PROCEEDINGS BELOW

As a result of the loss of its ship charter, the petitioner Hyman-Michaels, an Illinois corporation with its principal place of business in Chicago, brought this action against Swiss Bank, a Swiss corporation with its principal office in Basle, Switzerland, in a federal court

in the Northern District of Illinois on the basis of diversity of citizenship, seeking to recover its expenses in the second arbitration proceeding plus the profits that it lost because of the cancellation of the charter. At the time the ship charter was withdrawn, Hyman-Michaels had sub-chartered the Pandora at a rate double the rate fixed in the charter. Its lost profits are based on the difference between the charter and subcharter rates.

The case was tried to a district judge without a jury, who decided that Swiss Bank had been negligent and under Illinois law was liable to Hyman-Michaels for $2.1 million in damages. 522 F. Supp. 820 (1981). This figure consisted of about $16,000.00 in arbitration expenses and the rest in lost profits on the subcharter of the Pandora. All other claims, cross-claims and counter-claims by the parties were denied.

The $2.1 million judgment rendered

by the District Court in petitioner's favor was reversed by the Court of Appeals for the Seventh Circuit on the grounds that the doctrine of Hadley v. Baxendale precludes the recovery by Hyman-Michaels of its expenses and lost profits and that Hyman-Michaels acted imprudently. 673 F.2d 951 (7th Cir. 1982). Judgment was, therefore, entered for Swiss Bank and costs of appeal assessed against Hyman-Michaels.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRS IN INSULATING BANKS FROM DAMAGES FOR LOSING DIRECTIONS SENT BY TELEX.

The Court of Appeals fashions a rule of law which insulates banks from recovery of damages by customers whose telex directions have been negligently lost or mishandled by banks. No legal basis exists for according banks such privileged status at the expense of customers.

As recognized by the Court of Appeals, this is a case of first impression in Illinois and apparently in reported common law. At issue is the degree of care required of the international banking community in its handling of wire transfers of funds. Under the guise of determining the extent of damages to be awarded where a bank negligently fails to transfer funds when requested to do so by wire, the Court of Appeals enunciates a rule of law which effectively insulates banks from liability by making virtually impossible the recovery of consequential damages occasioned by such conduct.

The rule of law which follows from the Court's opinion provides that although a bank can foresee that its failure to act promptly on a telexed request to transfer funds could cause substantial damage, "that kind of general foreseeability...does not justify an award of consequential damages." 673 F.2d at

959. Instead, the Court requires that banks have intimate and detailed knowledge of the transaction underlying the direction to transfer funds before banks will be held to have foreseen the harm that results from failing to follow the direction. This requirement effectively eliminates the possibility of recovering consequential damages against a bank in cases such as the present one.

In applying this new principle of law to the facts in the present case, the Court acknowledges that Swiss Bank did have knowledge concerning the underlying transaction. The Court finds that "[Swiss Bank] knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named Pandora." 673 F.2d at 956. The Court also does not dispute the District Court's finding that a major international bank should know that a failure to act promptly on a

telexed direction to transfer funds could cause substantial damage. Nonetheless, the Court refuses to affirm the District Court's award to Hyman-Michaels of $2.1 million in damages because Swiss Bank "did not know when payment was due, what the terms of the charter were, or that they had turned out to be extremely favorable to Hyman-Michaels." Id. at 956. Moreover, the Court thinks it necessary that Swiss Bank know that the Pandora's owner would try to cancel the charter if Hyman-Michaels was late in making payment in order for Swiss Bank to have foreseen that its failure to transfer funds, as directed, would result in substantial damages to Hyman-Michaels. Id.

The rule the Court fashions effectively precludes recovery of damages from a bank which negligently fails to perform as directed by telex, as illustrated by its application in the present case. It is unrealistic to expect that

customers can inform all banks that may participate in a fund transfer accomplished by telexed directions of the myriad of facts concerning the underlying transaction necessitating the transfer. In fact, businessmen and bankers would have time for nothing else but conversing with each other if banks were informed of all of the contingencies surrounding each request to transfer funds.

Precluding the recovery of consequential damages is tantamount to insulating banks from liability since there are typically no direct damages caused by a bank's negligent failure to follow telexed directions. There is no basis, either in law or fact, for according banks such status, to the detriment of bank customers, which places them beyond the law despite grossly negligent conduct. The Court of Appeals, therefore, errs in applying this rule to the facts in this case.

II. THE COURT OF APPEALS VIOLATES RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE BY DISREGARDING THE TRIAL COURT'S FINDINGS OF FACT.

The District Court, after a three-week trial, was shocked by Swiss Bank's "cavalier" attitude toward the handling of major transactions accomplished by telex. 522 F. Supp. at 820. The District Court found as follows:

> The facts indicate an appalling lack of regard on the part of Swiss Bank for the more than reasonably foreseeable possibility that the negligent maintenance of its foreign exchange telex machines could result in substantial damage to one of its customers. The burden of guarding against such a possibility is minimal in view of the potential injury involved. As between Hyman-Michaels and Swiss Bank, the negligence and carelessness of Swiss Bank is the proximate cause of the loss suffered by plaintiff Hyman-Michaels. (Emphasis added) 522 F. Supp. at 829.

The Court of Appeals, employing a theory of risk allocation never considered by the District Court, proceeds to ignore the District Court's findings of fact concerning foreseeability of damages and contributory negligence. The Court's

substitution of its own findings of fact for those of the District Court violates the "clearly erroneous" standard provided by Rule 52(a) of the Federal Rules of Civil Procedure. Moreover, the Court of Appeals errs in failing to remand the case for new findings, as it admits it could do, if the District Court's findings were inadequate. 673 F.2d at 959. Therefore, the ruling of the Court of Appeals should be reversed.

Rule 52(a) provides, in applicable part, that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (Emphasis added). The question for the Court of Appeals is not whether it would have made the findings the trial court did, but whether on the entire evidence it is left with the definite and firm conviction that a mistake has been committed. Zenith Radio Corp. v.

Hazeltine Research, Inc., 395 U.S. 100 (1969). The Court of Appeals egregiously violates this principle in the present case by substituting totally unsubstantiated findings for findings of the District Court which are based on the credible evidence of record.

A. The Court of Appeals Substitutes Its De Novo Findings Concerning the Foreseeability of Damages.

The Court of Appeals, on the basis of its own erroneous findings of fact, concludes that Swiss Bank did not have enough information to infer that if it lost a $27,000 payment order it would face a liability in excess of two million dollars. 673 F.2d 951, 956. The Court concedes that Swiss Bank knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named Pandora. Id. The Court finds, however, that Swiss Bank did not know when pay-

ment was due. Id. In so holding, the Court of Appeals completely ignores the District Court's explicit factual finding that failure to act promptly upon receipt of a telex message could result in substantial damage to a customer of the bank. 522 F. Supp. 820, 833. The District Court's finding is supported by substantial evidence of record.

Mr. Keith Foulds, an officer of the British Post Office and an expert on telex communications, testified that the use of a telex denotes that time is of the essence. (Tr. 830). This conclusion was confirmed by Mr. John Biella, an officer of Continental who headed its international operations department. (Tr. 1188). The District Court therefore found that "[t]he fact that plaintiff was transferring funds by wire rather than through the mail was sufficient to alert Swiss Bank to the importance of the transaction" and that "Swiss Bank, as a major international bank, could reasonably foresee that

failure to act promptly upon receipt of such a telex message could result in substantial damage to a customer of the bank." 522 F. Supp. 820, 833.

Moreover, the face of the telex itself advised Swiss Bank that the due date for payment on the ship charter was imminent. The telex states, in part: "HIRE MV PANDORA FOR PERIOD APRIL 27 MAY 11-73. . . ." Had Swiss Bank actually seen the message which was received by its telex machine, instead of negligently mishandling it, it would have been apparent to Swiss Bank that the payment was due on or before the date beginning the period of hire. Certainly, anyone who has ever paid rent on a monthly basis on an apartment knows that in most cases the payment is due on or before the date beginning the monthly rental period. Additionally, the Court of Appeals acknowledges that Swiss Bank knew or should have known Hyman-Michaels was making payment for hire of a ship. 673 F.2d at 956. Thus there was ample

support for the District Court's finding that the type of harm which occured, the loss of the ship charter, was foreseeable to Swiss Bank at the time the telex was received. 522 F. Supp. at 833.

The Court of Appeals' conclusion that such "general foreseeability" does not justify an award of consequential damages, on the other hand, is based on a substitution of its own finding, contrary to the "clearly erroneous" standard and without any support in the record, that "[e]lectronic funds transfers are not so unusual as to automatically place a bank on notice of extraordinary consequences if such a transfer goes awry." 673 F.2d at 956. Given the evidence of record concerning information available to Swiss Bank at the time of the transaction, the findings of the District Court concerning foreseeability were not clearly erroneous and should have been followed by the Court of Appeals.

B. The Court of Appeals Substitutes Its Findings Concerning Contributory Negligence.

The Court of Appeals also improperly substitutes its findings of fact for those of the District Court on the question of Hyman-Michaels' ability to avoid or minimize the consequences of Swiss Bank's acknowledged negligence and then proceeds to bar Hyman-Michaels from recovery by reason of its supposed imprudence.[3/] 673 F.2d at 957. The District Court had squarely found that Hyman-Michaels had not acted imprudently. 522 F. Supp. at 831. It is well established that the determination of contributory negligence is a question of fact

3/ Contributory negligence is no longer a bar to recovery of damages in Illinois, which adopted the principle of comparative negligence subsequent to trial of the present case. Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). A retrial of this cause would, therefore, be governed by the principle of comparative negligence.

which cannot be overturned on appeal unless there is no support for such a finding in the record. United States v. Hill Lines, Inc., 175 F.2d 770 (5th Cir. 1949). See also McAllister v. United States, 348 U.S. 20 (1954).

The Court of Appeals erroneously asserts at two separate points in its opinion that Hyman-Michaels waited until the last possible moment to try to make payment. 673 F.2d at 956, 957. This conclusion flies directly in the face of the explicit factual finding by the District Court, based on uncontroverted evidence, that Hyman-Michaels gave the banks three business days lead time, a day more than was advised by Continental itself, to carry out a communication which is "essentially instantaneous." 522 F.Supp. at 831. Moreover, the District Court found that a three-day lead time for effecting payment was reasonable. 522 F. Supp. at 831. The uncontroverted evidence at trial supports

the District Court's finding. (Tr. 319-20; 81.)

Additionally, and perhaps most importantly, the Court of Appeals ignores two crucial factual findings of the District Court:

(1) "There is no evidence that a longer lead time would have insured a different outcome, given the customary procedures of the defendant banks"; and

(2) "Even with a longer lead time, plaintiff still would not have learned of the non-receipt of the nineteenth installment until notified by the owner on April 27, 1973." 522 F. Supp. at 831-32.

Thus, even if Hyman-Michaels had sent the telexed payment instruction three weeks in advance, instead of three days, Hyman-Michaels still would not have learned of the owner's non-receipt and intention to withdraw the Pandora until the owner telexed Hyman-Michaels on the morning of April 27, 1973, the day payment was due.

The Court of Appeals again errs in finding that Hyman-Michaels failed to "pull out all the stops" and "dithered" upon being notified by the owner of its intention to withdraw the charter. On the basis of these erroneous findings, the Court wrongly concludes that Hyman-Michaels had been "imprudent" in its post-notification conduct. 673 F.2d at 954. Nothing could be farther from the facts, as reflected by the evidence of record and as found by the District Court. The District Court found that almost immediately upon receiving notification of the owner's intentions, Hyman-Michaels:

(1) contacted Continental to advise it of the problem and instructed Continental to instruct its correspondent, Swiss Bank, to persist in attempting to effect the payment even in the face of a rejection by the owner's bank;

(2) telephoned the owner's representative on the morning of April 27, and told him that payment had been made; and

(3) informed its admiralty counsel in New York City of the situation who, in turn, contacted the owner's attorneys and reached an agreement that day to submit the matter to arbitration. 522 F. Supp. at 825.

The Court of Appeals improperly ignores these findings of fact and asserts that Hyman-Michaels is culpable for failing to wire a "duplicate payment" immediately after being notified by the owner. The Court's statement illustrates its misunderstanding of the nature of the transaction. The original payment had never been lost or misplaced so there was no need for Hyman-Michaels to again withdraw funds from its account at Continental and place funds into Swiss Bank's account. Swiss Bank still had the funds originally transferred by Hyman-Michaels. What had been lost was the message to Swiss Bank sent by Continental advising Swiss Bank that funds had been placed in its account at Continental and directing that it transfer

funds to the owner's bank, with which Continental had no correspondent banking relationship. The difficulty was not in making the payment to Swiss Bank but in getting Swiss Bank to effect payment to the owner. Therefore, Hyman-Michaels' re-instruction to Continental, and indirectly to Swiss Bank, to effect the payment was precisely the proper action to take and was correctly held to be so by the District Court. 522 F. Supp. at 829.

Instead of acting in accordance with Hyman-Michaels' instructions, however, the banks decided to first try to trace the lost telex. Although Hyman-Michaels told the banks to effect payment and never asked the banks to trace the first telex, the Court of Appeals improperly imputes the actions of the banks to Hyman-Michaels in finding that Hyman-Michaels "allowed things to slide until May 2," the date on which the original telexed direction to effect

payment was retransmitted by Continental to Swiss Bank and acted upon by Swiss Bank. 673 F.2d at 957. Pursuant to the agreement between Hyman-Michaels and the owner, previously entered into on April 27, 1973, the owner accepted the payment from Swiss Bank on May 2, 1973. (Swiss Bank Appendix, p. 219).

By improperly substituting its own erroneous view of the facts for those findings by the District Court, and then barring petitioner from recovery because of its supposed misconduct, the Court of Appeals violates the principal purpose of Rule 52(a) of avoiding a de novo trial of the facts by a reviewing court. Moreover, the findings of the Court of Appeals distort the reality of international wire transfers of funds so as to permit Swiss Bank to avoid culpability for its egregious misconduct. The decision of the Court of Appeals should, therefore, be reversed.

III. THE COURT OF APPEALS IMPROPERLY IGNORES CONTROLLING ILLINOIS LAW WHICH ALLOWS A PRINCIPAL TO RECOVER A TORT MEASURE OF DAMAGES FOR A BREACH OF DUTY BY AN AGENT.

The Court of Appeals, in fashioning its own rule of law to deny recovery to Petitioner, ignores controlling Illinois case law which requires application of a tort measure of damages. The Court mistakenly determines that Illinois courts would apply the principle of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), in the present case. As a result, the Court applies a stringent contract foreseeability standard in determining that Hyman-Michaels could not recover the damages proximately flowing from Swiss Bank's negligent conduct, rather than the less stringent standard applicable in tort cases. The Hadley limitation, of course, applies only in contract cases. See, e.g., Patterson, The Apportionment of Risks Through Legal Devices, 24 Colum. L. Rev. 335, 342

(1924). Under the proper tort standard, which Illinois courts follow, Hyman-Michaels is clearly entitled to a recovery of its lost profits.

Hyman-Michaels brought suit against Swiss Bank based on the tort theory of negligence. The Court of Appeals acknowledges that "there is an irreducible amount of speculation involved . . ." in its conclusion that Iliinois courts would limit a plaintiff to contract damages in a case alleging a tort where, as here, there is no contract between the parties. 673 F.2d at 956. The Court claims it is forced to speculate because it can find no Illinois case which has previously considered this issue. Indeed, the Court finds it only implicit in the case it relies on, Siegel v. Western Union Tel. Co., 312 Ill. App. 86 (1941), that Illinois courts would apply Hadley in the present case. The Court's supposition is based on the fact that, despite a statement in

the Siegel decision that the defendant had conceded its negligence, Hadley is still applied in determining the proper measure of damages.

The Court fails to note, however, that Siegel is pleaded as a contract action. There is no mention anywhere in the decision that the plaintiff alleged the defendant's negligence constituted a tort. Thus, the Siegel court never considered the key issue now facing this Court of whether Hadley applies where a plaintiff sues in tort in the absence of a contract.

In Miller v. John, 111 Ill. App. 56 (2d Dist. 1903), which was cited to the Court of Appeals in Hyman-Michaels' Petition For Rehearing, plaintiff sued in an action on the case for fraud and deceit in two counts. Count I alleged wrongful intention to defraud and deceive. Count II alleged that defendants represented they would, as plaintiff's agent, trade and exchange for the plain-

tiff his farm for farm lands of greater value and that defendants made false and fraudulent representations.

Following a verdict for plaintiff, it was contended by defendants, on appeal, that their motion for a new trial should have been sustained because, inter alia, "there was a misjoinder of causes of action in the declaration; the argument being that because the second count sets out the contractual relation of principal and agent, that the second count is based on contract and that the measure of damages under the two counts is entirely different." Id. at 59. In response, the Court stated:

> "While the second count introduces the relation of principal and agent, it is not a count on the contract, but is in tort for fraud and deceit. The relation of principal and agent is no reason why the agent may not be sued in an action of tort by his principal, and in such case the measure of damages is the same as if the relation did not exist. (Emphasis added.) Id.

Thus, Miller holds that where, as here, a principal (Hyman-Michaels)

sues its agent (Swiss Bank), it may sue in tort and the court will apply a tort measure of damages. The Court of Appeals could have avoided speculating as to Illinois law by following the guidance provided by Miller. Its failure to do so constitutes a violation of the rule in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), which requires a federal court to follow state law in a diversity action, and results in the application of an improper test of foreseeability of damages in the present case.

The standard of foreseeability applied in tort requires only that the resulting harm ought to have been foreseeable in a general way and not that the precise course or the full extent of the consequences be foreseeable. See 2 Harper & James, The Law of Torts, § 20.5 at 1147 (1956); O'Brien v. Chicago & N.W. Ry. Co., 329 Ill. App. 382, 68 N.E.2d 638 (1946). By contrast, the standard being applied by the Court of

Appeals, based on its erroneous interpretation of Hadley, requires that the breaching party have actual notice, in detail, of the special circumstances pertaining to the transaction. (See § IV, infra.)

The Court of Appeals acknowledges and does not controvert the finding of fact by the District Court that "'a major international bank' should know that a failure to act promptly on a telexed request to transfer funds could cause substantial damage. . . ." 673 F.2d at 959. Moreover, the District Court found that "Swiss Bank was aware of the fact that the telex machines in the Foreign Exchange Department were receiving three or four diverted messages per week which could involve large sums of money." 522 F. Supp. at 833.

There is no doubt, therefore, that Swiss Bank did foresee or at least ought to have foreseen "in a general way" the consequence of lost profits resulting

from its negligent mishandling of a telex, even if the precise extent of the harm might have been unforeseen. Since the harm was sufficiently foreseeable for purposes of awarding damages based on a tort, the Court of Appeals errs in holding that merely because Swiss Bank could not measure the precise potential harm to Hyman-Michaels, it should not be held liable for that harm. 673 F.2d at 958. This case was tried and decided by the District Court as a tort negligence case, and the Court of Appeals errs in deciding it as a contract case.

IV. THE COURT OF APPEALS' READING OF HADLEY V. BAXENDALE IS INAPPLICABLE TO CONTEMPORARY INTERNATIONAL BANKING TRANSACTIONS.

Even if Hadley v. Baxendale is applicable to the facts of this case, the Court of Appeals errs in applying a parsimonious reading of the Hadley rule in determining whether Hyman-Michaels is entitled to recover its consequential

damages. The Court interprets Hadley as providing that actual notice prior to a breach of "special" circumstances is a prerequisite for recovering consequential damages. In fact, however, English and American courts in modern times have substituted an objective test focusing on what may reasonably be assumed was within the contemplation of the parties in lieu of the archaic interpretation the Court of Appeals applies. A restrictive reading of the Hadley rule is particularly inappropriate in the context of contemporary international banking transactions.

In Britain, where the Hadley rule originated, a leading case has recently interpreted the rule as follows:

> The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed

> naturally from the breach or that loss of that kind should have been within his contemplation. (Emphasis added.) The Heron II, Koufos v. C. Czarnikow, Ltd., [1967] 3 All ER 686 at 691, [1969] 1 AC 350 at 385.

The "reasonable man" standard has also been adopted by American courts interpreting Hadley. See, e.g., Gurney Industries, Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972). The emergence of this modern, objective interpretation of Hadley in both English and American courts has been noted by at least one legal scholar. See G. Gilmore, The Death of Contract, 83-84, 88 (1974).

The objective standard is particularly appropriate in the context of the telecommunications field which has undergone dramatic changes since the horse and buggy days of Hadley, some 128 years ago. The telex transaction at issue here was not the result of an individually bargained-for agreement like the delivery of the mill shaft in Hadley. There was, in fact, no interface at all

between Hyman-Michaels and Swiss Bank prior to learning of the telex failure. Thus, there was no opportunity to discuss with Swiss Bank the detailed "special" circumstances surrounding the underlying transaction, as the Court of Appeals requires.

There were, however, specific factual findings by the District Court based on the evidence of record, that:

(1) Prior to losing the telex, Swiss Bank knew that three to four messages per week were being diverted to the foreign exchange room and that the average size of a telex transfer was in excess of a million dollars;

(2) three or four diverted messages per week constitutes sufficient notice of the potential risk involved to Swiss Bank's customers;

(3) diverted messages may involve large sums of money and that, if such a message is lost or not acted upon promptly, the damages suffered by the initiator may be substantial; and

(4) the fact that Hyman-Michaels was transferring funds by wire rather than through the mail was sufficient to alert Swiss Bank of the importance of the transaction. 522 F. Supp. at 829, 833.

Applying the appropriate objective standard of foreseeability to these facts, it is apparent that a reasonable man could have foreseen the damages which resulted from Swiss Bank's negligent loss of the telex directions. Thus, the Court of Appeals errs in finding that the rule in Hadley bars Hyman-Michaels from recovering its consequential damages of two million dollars.

CONCLUSION

After a three-week trial, the District Court held Swiss Bank liable for the damages caused by its "cavalier"[4/] and "appalling"[5/] misconduct. In reversing, the Court of Appeals relied on an economic theory never considered by

4/ 522 F. Supp. at 820.

5/ 522 F. Supp. at 829.

the trial court and fashioned a new rule of law which insulates banks from liability for losing telexed directions. The Court of Appeals disregards without any mention controlling Illinois case law which mandates application of a tort measure of damages and misapplies Hadley v. Baxendale. Finally, the Court of Appeals disregards key factual findings by the trial judge as to foreseeability of damages and contributory negligence and summarily reverses without allowing the trial court to apply the law to the facts proven upon trial.

The result visits severe injustice upon Petitioner by leaving it without a remedy for Swiss Bank's gross misconduct. It also leaves all bank customers who rely on telex communications without a remedy against gross carelessness by banks, leaves a misreading of nineteenth century British law as controlling modern banking transactions and leaves

courts of appeals free to disregard findings of fact by district courts as well as controlling state law.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.[6/]

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6/ Continental Illinois National Bank and Trust Company of Chicago was a counterdefendant-appellee and third-party defendant appellee in the proceeding below. Review by this Court of the judgments in favor of Continental is not sought here.